ETHNOLOGICAL JURISPRUDENCE.*

THERE is in the history of jurisprudence no more significant event than the foundation of the historical school by Gustav Hugo and Carl von Savigny. Jurisprudence, up to that time, was not a science, at least not a science in the modern acceptation of the term. It was an art, which the practical lawyer learned and employed in strict conformity with practical traditions, without reflecting on the reasons in virtue of which a legal norm or a social institution existed. The only part of jurisprudence of a scientific tendency was the philosophy of law. This latter branch had, since Hugo Grotius, emancipated itself from the church, but it had advanced no farther than to substitute for the will of God, to which formerly right and wrong had been traced, the principle of human nature, and to found upon the social instincts of man a system of natural law,—an ideal jurisprudential state by reference to which positive laws were tested in respect of their conformity with the ideally right and the ideally wrong. This fundamental conception of the essential character of law was only slightly modified by the substitution of the human reason for human nature. The rational systems of jurisprudence also derived the state and the law from the individuality of man, especially from the social traits of this individuality, and definite notions and principles were thus enunciated from which state and law were deductively constructed.

The historical school first introduced a change in all this. It afforded the legal practitioner the possibility of seeing that the law

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*Translated from the manuscript of Dr. Albert Hermann Post by Thomas J McCormack.

which he applied was the slowly ripened product of a course of development that extended over many centuries, and it afforded the philosophical juristic inquirer the possibility of understanding, that the law was not founded on immutable ideas and principles, but that it was a product of the creative mind of a nation, that this product was subjected to processes of transformation and development, and did not admit of regulation by the individual reason of a single philosophical inquirer. But while the history of law has become a universally recognised discipline in the science of jurisprudence, the application of its underlying principles to the philosophy of law has as yet by no means been universally carried out. On the contrary, the reason still plays an extensive rôle as foundation and evolutionary principle; and to a great extent the history of law and the philosophy of law still pursue their solitary ways as independent branches of knowledge.

In recent times, through the influence of ethnology, jurisprudence has entered on a new epoch. A new branch of the science of law has arisen in Europe, the so-called ethnological jurisprudence, and has already found in Germany, Austria, Italy, France, Belgium, and Holland, enthusiastic supporters. Ethnology, as it is known, is the science that has for the subject of its investigations the totality of phenomena of social life of all the peoples of the earth, and which makes use, in this investigation, of the methods of inductive inquiry exclusively employed by physical and natural science. After the science of ethnology had advanced to a certain point, the extension of ethnological inquiry to the domain of jurisprudence followed as of course.

To a certain extent the investigations of the history of law had prepared the way for ethnological jurisprudence. The inductive method was common to both. The idea of a history of the development of law was no longer strange to jurisprudence. Only the courage was wanting to allow the eye to range over the legal systems of all the peoples of the globe, instead of, as before, restricting it to very narrow limits. The historical investigation of law began in Europe with the history of the Roman law. Thereupon it was immediately extended to the Germanic laws of Europe, so

that now all West-European peoples possess a highly developed history of law of their own. Recently, also, the history of Slavonic law has been assiduously treated.

Whereas in every case here it was a question of the sources of the laws that stood in immediate historical connection with the prevailing systems of Europe, jurisprudential investigation was slowly extended to more remote ethnical fields. The first impulse in this direction came from comparative philology. This science had succeeded in tracing the languages of extended groups of peoples back to common primitive tongues. Among these primitive tongues the Aryan, the common original language of the Indo-Germanic group of nations, first occupied the attention of inquirers, and the law of this group of nations thus became the first object of investigation of a comparative jurisprudence extending beyond the more restricted provinces of the history of law. The provinces of Græco-Italic, Germanic, Slavic, Celtic, Iranic, and Indian law were investigated with respect to a common origin, and various agreements and various deviations were discovered. In very recent times the laws of the Armenians and the Ossetes in the Caucasus have been added to the laws of the Aryans, and the laws of the Afghans will probably soon follow these.

A number of more remote provinces of law have also been entered upon, in connection with theological, philological, and connate inquiries. Thus, particularly, in connection with biblical investigation the Israelitic law, in connection with the study of Arabic the Islamitic, in connection with the decipherment of the hieroglyphic writings the Old-Egyptian, in connection with the decipherment of the cuneiform inscriptions the Soumerian and the Assyrian-Babylonian, and in connection with sinology the law of China. In very recent times the Japanese law has also been treated.

In the laws of all these peoples, by the side of many peculiarities, were also found many phenomena of frequent and universal recurrence.

After the science of law had so far extended its activity in this direction, it was a final step only that ethnological jurisprudence took when it declared that the subject of juristic science was the

investigation of the laws of *all* the peoples of the earth. And yet this step was perhaps a more important one than all that had hitherto been taken. For a considerable group of peoples had up to then been entirely neglected by the science of law, namely the uncivilised peoples, the so-called primitive peoples or *Naturvölker*. And just the laws of these savages furnished the most remarkable disclosures. They exhibited everywhere the most singular parallel phenomena, and made it possible to open up a complete early history of the law, and to bring to light periods of jural development of which the history of civilised peoples has preserved but a few unintelligible remains. Ethnological jurisprudence is thus able to supply complementary information at a point where the threads of the history of law are lost in the obscurity of early times.

The condition of jural life in these primitive periods is very singular. No juristic philosopher has ever lighted on the idea that primitive man could exist with such jural conceptions as he actually does. That which ethnological jurisprudence has brought to light in this connection is something absolutely new and astonishing, something that no brooding brain could have ever developed out of any idea or principle. Indeed, it is so strange that it could not be conceived at all if we did not have it before our eyes to-day among savage tribes.

The collecting of the laws of uncivilised peoples constitutes an independent task of ethnological jurisprudence. In this way the latter science will fill up the gaps which historical jurisprudential inquiry left open in our knowledge of the jural life of man. But more important than all, perhaps, will ethnological jurisprudence become for the future development of the philosophy of law. In this connection it goes hand in hand with the sociological tendency which dominates our time and has its surest foundation in ethnology.

The prime significance of ethnological jurisprudence lies in the fact that it is an ethnological science.

At first ethnology was a purely empirical science. It gathered together all the attainable phenomena of ethnic existence, and separately, at first, among single peoples and tribes. After an extensive

store of material had accumulated in this manner, the discovery was made that in many provinces of ethno-social life, especially in the provinces of religion, law, and morals, especially also in all provinces of social custom, phenomena of essentially similar character presented themselves among a great number of peoples in the case of whom neither any original tribal relationship nor any infusion from one nation into the other could be assumed; and, curious to say, these were frequently the most singular phenomena, of which one would have thought at first that they had sprung from the individuality of a determinate people. This discovery of universal ethnographic parallels was all the more surprising in view of the fact that historical special inquiry, whose province up to then had been essentially national life, had placed especial emphasis on outwardly prominent events occurring in a different form in every nation, whereas phenomena that appeared uniformly among the different nations were little noticed. People had therefore grown accustomed to regard every nation as something existing by itself and peculiar to itself, and, particularly, had also declared it as inadmissible to employ phenomena of the life of one nation to explain corresponding phenomena of the life of another nation.

The discovery of ethnographical parallels led to wholly different ideas. It became clear that a great portion of human ethnical existence was not founded in the peculiar character of particular peoples, but in the character of the human race, in the universal nature of man. And it became in addition clear that that which repeated itself everywhere on the earth, which was therefore an expression of the universal human, was something entirely different from that which previous philosophy had declared to be the actual human. It also became clear, at the same time, that the nations thought quite differently from what the individual man did. With this, however, the foundation of the entire previous philosophy was shaken. If the axiom of modern ethnology is correct, namely that it is not *we* that think, but *it* that *thinks in us*,* we shall no longer be able to explain our nature from our consciousness, from our ego, from our

* Bastian.

reason, but we shall have to pursue this momentous "It" that thinks in us, and since we cannot find it *in* us we shall have to search for it *outside of* us in the expressions of the human soul in the life of the race.

This is the fundamental idea of modern ethnology. It seeks to collect all the expressions of the human soul in the life of the species, and from them to derive its inferences as to the nature of man. It regards ethnic existence as the precipitate of human psychical existence, and not merely of that part of it which is conscious, but also of that part of it which is unconscious, that which is inaccessible to introspective observation, that which is not thought, but is merely lived. It enlarges accordingly the domain of psychology, which was restricted hitherto to the analysis of the human consciousness, by the incorporation of an additional domain unmeasured in extent.

These general conceptions of ethnology are also determinative for the science of ethnological jurisprudence, and from this results its peculiarity as contrasted with the other branches of juristic knowledge.

Ethnological jurisprudence places the centre of gravity of the science of law not like the previous juristic philosophy in the individual jural consciousness, but in the law viewed as a province of ethnic existence. It regards the laws of the nations as the precipitates of that which is now active and has been active as jural instinct in the entire human race. It assumes that when all the phenomena of law in the life of the nations have been fixed, an infinitely more valuable material will be drawn therefrom adapted to the disclosure of the nature of law than could have ever in the world been acquired by an analysis of the individual jural consciousness. It does not regard the individual jural consciousness as something innate in man and exempt from the altering effects of time, but as a product of the social conditions in which the individual has grown up. It assumes, therefore, that the individual jural consciousness changes with a change of the social conditions, so that a man who grows up under different social conditions possesses a different jural perception. This assumption, if we compare the expressions of the jural

consciousness of races low in the scale of culture with those of civilised peoples, is one that cannot be escaped. We have only to recall to mind the irresistible force with which the jural sense of peoples that live under clan-constitutions demand vengeance of blood, whereas this species of retaliation no longer exists in our jural consciousness of to-day. Thus there are hundreds and thousands of jural instincts and conceptions which are present at certain stages of civilisation and disappear entirely at others.

Ethnological jurisprudence therefore assumes, that the juristic philosopher who lays at the foundation of his system essentially his own jural consciousness, simply enunciates therewith a system of law that answers perhaps to the current conceptions of his time and his people, but which can in no sense lay claim to a value beyond that.

Quite different, on the other hand, are matters conditioned when the inquirer has before him the laws of all the peoples of the earth from the lowest to the highest. Here he has in his possession a picture of the jural consciousness of the mind of humanity, which is no longer subject to alteration, but which, to the extent that the development of human jural life has advanced, is complete.

For the execution of its task ethnological jurisprudence first requires a collection of the laws of all the peoples of the earth. Each one of these laws is of equal value to ethnological jurisprudence in so far as the jural consciousness of humanity has found expression in it in any form. Especially deserving of consideration are the laws of the so-called savage peoples that have been so much neglected and contemned hitherto ; since they bring to light the jural consciousness of humanity in its germinal stages, and since higher formations are invariably best understood when we know their first beginnings.

The solidest basis for ethnological jurisprudence would be furnished by a monographic treatment of the law of every single tribe and people of the earth. By such monographic treatments the entire social organisation of a given tribe or people would be exhibited in all its complicated reciprocal relations, and we should be able to follow the law in all the thousands of minute ramifications that con-

nect it with the remaining provinces of national life. But such a monographic treatment of the law of all the nations of the earth is accompanied with great difficulties, and this part of the task of the science of law has as yet been undertaken only to a limited extent.

The condition of affairs is best in this respect where the nations themselves have collected and compiled their legal customs in books of laws. But such collections are found only among peoples that deserve to some extent the appellation of civilised peoples. Among the great majority of peoples the law is simply practised and handed down by oral tradition, so that here the legal customs must be collected by members of foreign civilised nations,—a very difficult labor and one that can be accomplished only by persons who take up their abode permanently among the races in question and become thoroughly familiar with their language and habits of life.

Collections of this character we possess unfortunately only to a very limited extent, and our knowledge accordingly of the law of uncivilised peoples is still very meagre. Even the books of law possessed by the various peoples have not all been made available to juristic science. In part they have not yet been printed, and in part they have not yet been translated into a generally understood language. Considerable time will yet be required before the existing material has been made wholly accessible.

Not before the legal customs of all the peoples of the earth have been collected will ethnological jurisprudence be in a position to furnish a successful solution of the task it has set itself,—the task namely of a causal analysis of all the phenomena of the jural life of the human race. Yet to a certain extent this task may be undertaken at present, even with a relatively limited store of material.

The starting-point for the ethno-juristic investigation of the phenomena of jural life is furnished by the ethno-juristic parallels, legal customs that are found uniformly appearing among the nations, without there being any reason to assume that one nation has received them from another. Legal customs of this character are in part so universally diffused over the earth that they may be characterised as a common possession of mankind; in part they appear sporadically among unrelated peoples; in part they are restricted

to more limited domains. The most important legal customs are those that have universal dissemination; for here it may be assumed that they are a necessary emanation of the social side of human life. Legal customs that occur only sporadically, but appear uniformly among unrelated peoples, must likewise be regarded as the products of the universal nature of man, yet only as such that *can* arise under definite conditions of existence. Legal customs that occur only in limited ethnological domains will have to be referred to the peculiar character of definite peoples and tribes. Legal institutions of universal character are, for example, the forms of marriage by capture and purchase of the bride, blood-vengeance, the right of refuge, the systems of composition, ordeals, oaths, and so forth. Almost universal are the levirate, and the betrothal of children. Sporadically among unrelated peoples appear: the seizure of the corpse of the debtor for debt; execution by fasting, whereby the creditor brings pressure to bear upon his debtor by having him fast a definite period of time before his dwelling; the custom of the chief doing combat with his grown up son, to whom the command of the tribe passes if he conquers his father; and so forth.* Frequently it is the most curious customs that thus recur, among peoples that are completely separated from each other by oceans and inaccessible mountain ranges and have unquestionably never been in communication with each other.

The explanation of these ethno-juristic parallel phenomena is in part not very difficult, inasmuch as many of them can be traced back to fixed forms of social organisation. Thus, for example, a whole group of universally recurring legal customs is associated with the peculiar formation of the clan-constitutions and clan-law which regularly appears among uncivilised peoples and characteristically differs from the form of political organisation familiar to the present age. Many legal customs are also based on religious conceptions and social customs, and their explication in such cases is frequently very difficult.

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* The reader will find a brief survey of the ethno-juristic parallels appearing among the various peoples of the earth, in a treatise of mine entitled *Ueber die Aufgaben einer allgemeinen Rechtswissenschaft* (1891), pp. 27 to 72.

A complete explanation of all the legal customs of all the peoples of the earth with respect to their social causes would exhaust the work of ethnological jurisprudence as an ethnological discipline. But in the same way that the acquisitions of ethnology are in their turn utilisable towards the constitution of a universal philosophy, to which they will impart perhaps an entirely different character, so will the results of ethnological jurisprudence be in their turn utilisable towards the constitution of a universal science of law and for the philosophy of law, in which probably, through its means also, a powerful change will be inaugurated. These are the ideas, traced in their most general characters, that may be regarded as the fundamental ones in "ethnological jurisprudence."

ALBERT HERMANN POST.